

A Pustaka Yakin Pelajar Sdn Bhd v Penerbitan Inspirasi Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-221P-19-03
OF 2020

B MOHD RADZI J
30 DECEMBER 2020

C *Civil Procedure — Summary judgment — Application for — Plaintiff brought an action against defendant for breach of exclusive rights to sell and distribute past year exam papers — Whether triable issue existed — Burden on defendant to raise probable dispute and denials*

D This was a summary judgment application by the plaintiff against the defendant. The plaintiff filed an action in relation to the rights granted to publish, print and resell past year examination papers for the UPSR, PT3, SPM, SPMU and STAM examinations ('PYEP'). The plaintiff had by way of a distributor agreement dated 15 December 2017, that appointed the defendant as its exclusive distributor to sell and distribute the said PYEP which had been published and printed by the plaintiff. Sometime in April 2019, the plaintiff discovered that there was in the market PYEP published by the defendant which the defendant had falsely claimed to have the plaintiff's authorisation ('PYEP 2'). Despite several demands by the plaintiff to settle the amount due, the defendant failed/neglected/refused to settle the amount due. The plaintiff had terminated the distributor agreement on 1 October 2019. This was an application by the plaintiff for: (a) an injunction to restrain the defendant from publishing, printing, distributing and selling any publication consisting the PYEP; (b) passing off the plaintiff's goodwill in the defendant's infringing PYEP 2; (c) an order to recall the defendant's infringing PYEP 2 from the market; (d) the payment of nett sales in the amount of RM1.67m that was wrongfully withheld by the defendant to be paid to the plaintiff; and (e) the sum of RM177,587.42 to be paid to the plaintiff, such sum being late payment interest on the wrongfully withheld nett sales, as at 1 March 2020.

H **Held**, dismissing the application:

I (1) It was well established and already settled law that once an O 14 application was demonstrated to be correctly and properly filed, O 14 r 3 provided that the burden shifted and thus rested on the other party who sought to resist the application to raise a defence which showed a bona fide triable issue, in the sense of an issue or question in dispute which ought to be tried; or that there ought for some other reason to be a trial of the applicant's claim or part of that claim (see para 6).

(2) To determine whether or not there existed a triable issue, this court would only need to look at the defendant's affidavit and must be satisfied that there were inherently probable disputes and denials which would thus render the issue triable (see para 8).

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(3) Having perused the affidavits of the parties, and also the defendant's statement of defence, it was the court's finding that although the plaintiffs had fulfilled the threshold for this court to consider its application, the plaintiffs' application must be dismissed as it was found that the defendant had successfully raised an inherently probable disputes and denials. The court was satisfied that there were issues that ought to be tried at a full trial. These were issues that were not suitable to be determined at this stage through affidavit evidence, and it would not be appropriate for a summary judgment pursuant to O 14 to be granted (see para 10).

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[Bahasa Malaysia summary]

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Ini merupakan satu permohonan penghakiman terus oleh plaintiff terhadap defendan. Plaintiff telah memfailkan satu tindakan berkaitan dengan hak yang diberikan untuk menerbit, mencetak, dan menjual semula kertas peperiksaan tahun lalu untuk ujian UPSR, PT3, SPM, SPMU dan STAM ('PYEP'). Plaintiff telah melalui satu perjanjian pengedaran bertarikh 15 Disember 2017, melantik defendan sebagai pengedar eksklusifnya untuk menjual dan mengedarkan PYEP tersebut yang telah diterbitkan dan dicetak oleh plaintiff. Sekitar April 2019, plaintiff mendapati bahawa wujud dalam pasaran PYEP yang diterbitkan oleh defendan yang mana defendan telah secara salah menyatakan mempunyai kebenaran plaintiff ('PYEP 2'). Walaupun wujud beberapa tuntutan daripada plaintiff untuk menyelesaikan amaun yang terhutang, defendan gagal/cuai/enggan untuk menyelesaikan amaun terhutang. Plaintiff telah menamatkan perjanjian pengedaran pada 1 Oktober 2019. Ini merupakan satu permohonan dari plaintiff untuk: (a) satu injunksi untuk menghalang defendan daripada menerbitkan, mencetak, mengedarkan atau menjual apa-apa terbitan yang mengandungi PYEP; (b) kelirupaan nama baik plaintiff semasa defendan melanggar PYEP 2; (c) satu perintah untuk menarik balik pelanggaran defendan dalam PYEP 2 dari pasaran; (d) pembayaran hasil jualan bersih dalam amaun RM1.67 juta yang telah secara salah dipegang oleh defendan untuk dibayar kepada plaintiff; dan (e) jumlah RM177,587.42 untuk dibayar kepada plaintiff, yang merupakan faedah bayaran lewat kepada jumlah bersih jualan yang dipegang secara salah setakan 1 Mac 2020.

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Diputuskan, menolak permohonan:

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(1) Ianya adalah menjadi undang-undang mantap bahawa apabila satu permohonan A 14 ditunjukkan telah difailkan secara betul dan teratur, A 14 k 3 memperuntukkan bahawa beban berpindah kepada pihak yang

- A** memohon untuk menentang permohonan untuk menimbulkan satu pembelaan yang menunjukkan isu untuk dibicarakan yang bona fide, dalam perkara satu isu atau persoalan yang dicabar yang harus dibicarakan; atau bahawa ianya mempunyai satu sebab lain untuk satu perbicaraan tuntutan pemohon atau sebahagian daripada tuntutan tersebut (lihat perenggan 6).
- B**
- (2) Untuk menentukan sama ada wujud atau tidak isu untuk dibicarakan, mahkamah ini hanya perlu melihat kepada afidavit pembelaan dan harus berpuas hati bahawa wujud percanggahan dan penafian yang berkemungkinan yang akan menyebabkan isu tersebut merupakan isu untuk dibicarakan (lihat perenggan 8).
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- (3) Setelah meneliti afidavit pihak-pihak dan juga pernyataan pembelaan defendan, ianya merupakan dapatan mahkamah bahawa walaupun plaintif telah memenuhi keperluan untuk mahkamah ini menimbangkan permohonannya, permohonan plaintif harus ditolak kerana ianya didapati bahawa defendan telah berjaya untuk menimbulkan percanggahan dan penafian yang berkemungkinan. Mahkamah berpuas hati bahawa wujud isu yang patut dibicarakan sewaktu perbicaraan penuh. Isu ini tidak sesuai untuk diputuskan di peringkat ini melalui keterangan afidavit, dan ianya tidak sesuai untuk satu penghakiman terus selaras dengan A 14 untuk dibenarkan (lihat perenggan 10).]
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Cases referred to

- F** *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 2 CLJ Rep 186; [1992] 1 CLJ 653, SC (folld)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283; [1984] 2 CLJ 220, FC (folld)

G **Legislation referred to**

Rules of Court 2012 O 14, O 14 r 3

Kelvin Ng (Lee Sze Ying with him) (Vin & Isaac Lee) for the plaintiff.
Bryan Teo (Carmen Yen with him) (Joel & Mei) for the defendant.

H **Mohd Radzi J:**

BACKGROUND

- I** [1] The plaintiff pleaded in its statement of claim, inter alia, that:
- (a) in 2018 the Ministry of Education, on behalf of the Government of Malaysia, granted the plaintiff the sole and exclusive rights to publish, print and resell past year examination papers for the UPSR, PT3, SPM, SPMU and STAM examinations ('PYEP');

- (b) by way of a distributor agreement dated 15 December 2017, the plaintiff had appointed the defendant as its exclusive distributor to sell and distribute the said PYEP which had been published and printed by the plaintiff; **A**
- (c) sometime in April 2019, the plaintiff discovered that there are in the market PYEP published by the defendant which the defendant had falsely claimed to have the plaintiff's authorisation ('PYEP 2'); **B**
- (d) despite several demands by the plaintiff for the defendant to pay an amount totalling about RM1.67m owed by the defendant to the plaintiff, the defendant failed/neglected/refused to settle the amount due; and **C**
- (e) due to the said events, the plaintiff had terminated the distributor agreement on 1 October 2019. **D**
- [2] In its suit, the plaintiff claimed against the defendant for, among others:
- (i) an injunction to restrain the defendant from publishing, printing, distributing and selling any publication consisting the PYEP; **E**
- (ii) passing off the plaintiff's goodwill in the defendant's infringing PYEP 2; **F**
- (iii) an order to recall the defendant's infringing PYEP 2 from the market; **F**
- (iv) the payment of nett sales in the amount of RM1.67m that was wrongfully withheld by the defendant to be paid to the plaintiff; and **F**
- (v) the sum of RM177,587.42 to be paid to the plaintiff, such sum being late payment interest on the wrongfully withheld nett sales, as at 1 March 2020.
- [3] The plaintiff filed its O 14 application in encl 7 for this court to grant a summary judgment against the defendant partially, in particular with regards to the matters enumerated in paras [2](iv) and (v) above. **G**
- [4] I had disallowed the application and I state below my reasons for such decision. **H**
- THE DEFENDANT'S CASE
- [5] The defendant pleaded in its statement of defence that: **I**
- (a) prior to the plaintiff and the defendant signing the distributor agreement dated 15 December 2017, the plaintiff's subsidiary/related company BHS Book Printing Sdn Bhd had obtained a judgment against

- A** the defendant's related company Penerbitan IMT Sdn Bhd at the Kuala Lumpur High Court vide Civil Suit No 22NCC-107-04 of 2015 for the sum of RM1,708,883;
- B** (b) the plaintiff's executive director at that time had requested the defendant to pay the said judgment sum to BHS Book Printing Sdn Bhd and the legal fees amounting to about RM125,000 before the distributor agreement could be signed;
- C** (c) it had paid an amount of RM1,308,883 and the said legal fees as requested by the plaintiff's representative;
- (d) it had achieved annual gross sale amounting to more than RM20m for year 2018, which exceeded its obligation under the distributor agreement and thus would entitle the defendant to an extension and renewal period of the distribution agreement;
- D** (e) based on the above events, the termination of the distributor agreement by the plaintiff on 1 October 2019 was wrongful;
- E** (f) the plaintiff's allegation of the defendant's infringing acts of publication, printing, distribution and selling of the PYEP 2 was unfounded as PYEP 2 was based on past publications through collaboration between the defendant and Yayasan Guru Malaysia Bhd and Cepat Cetak Sdn Bhd that had occurred before the distributor agreement was signed. As such, the PYEP 2 does not conflict with or contradict the distributor agreement, as the copyright of those materials were owned by the defendant. In any case, the quantity of the printing of what was alleged by the plaintiff as the infringing materials were very minor and does not affect the target sales in the distributor agreement;
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- G** (g) the defendant's explanations as stated in the preceding paragraph had been proffered to the plaintiff at a meeting between the representatives of the plaintiff and the defendant on 26 August 2019 and was accepted by the plaintiff's representatives;
- H** (h) as a sign of its goodwill and in the hope of getting the distributor agreement renewed, the defendant issued notices dated 26 August 2019 and 29 August 2019 to the buyers and its vendors to recall the alleged infringing materials; and
- I** (i) despite the fact that the defendant had exceeded the sales target as provided in the distributor agreement, the fact that the plaintiff has accepted the defendant's explanation on the alleged infringement act, and the fact that the defendant had issued the notices of recall, the plaintiff decided not to extend the period of the defendant's distributorship and continued to terminate the distributor agreement.

FINDING

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[6] It is well established and already settled law that once an O 14 application is demonstrated to be correctly and properly filed, O 14 r 3 provides that the burden shifts and thus rests on the other party who seeks to resist the application to raise a defence which shows a bona fide triable issue, in the sense of an issue or question in dispute which ought to be tried; or that there ought for some other reason to be a trial of the applicant's claim or part of that claim.

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[7] The Supreme Court in the oft-cited *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283; [1984] 2 CLJ 220 had laid down this principle as follows:

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We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are:

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- (1) whether the case comes within the order; and
- (2) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:
 - (i) the defendant must have entered an appearance;
 - (ii) the statement of claim must have been served on the defendant; and
 - (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.

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... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him.

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[8] To determine whether or not there exist a triable issue, this court would only need to look at the defendant's affidavit and must be satisfied that there are inherently probable disputes and denials which would thus render the issue triable. This was the principle laid down by the then Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 2 CLJ Rep 186; [1992] 1 CLJ 653 where it was held:

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In an application under O 14, the court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need only show that there is a triable issue.

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Under an O 14 application, the duty of a judge does not end as soon as a fact is

- A** asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements made by the same deponent, or is inherently improbable in itself, then, the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless
- B** this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

C [9] In compliance with the instructive decisions of the apex court as stated above, I had perused the affidavit affirmed by Teoh Hok Beng for the defendant on 2 June 2020 (encl 11) in answer to the plaintiff's affidavit in support of its current application. There I found that the defendant had, inter alia, averred that:

- D** (a) the plaintiff's own actions had precluded and obstructed the defendant from carrying out its obligations under the distributor agreement;
- (b) sometime in July 2019, the plaintiff had informed the buyers that it will not renew the distributor agreement. This had resulted in the lost of confidence against the defendant among the buyers;
- E** (c) the plaintiff had delayed its supply of the 2019 examination questions to the defendant by about seven months that had resulted in the consequential delay in the publication;
- (d) the plaintiff had shown mala fide with intent to injure the defendant by its action to establish Systems Publications Sdn Bhd on 13 June 2019, some four months prior to the termination of the distributor agreement, a company that was set to take over the distributorship role from the defendant;
- F** (e) the defendant validly retained the balance sum of the monies to be paid the defendant to the plaintiff as the retention was necessary to protect and safeguard the defendant's interest; and
- G** (f) due to the plaintiff's action in terminating the distributor agreement prematurely, the defendant was left with an unsold copies of the printed and published PYEP amounting to RM1,030,507.

H [10] Relying on the principles laid down in *National Company for Foreign Trade* and *Bank Negara Malaysia*, and having perused the affidavits of the parties, and also the defendant's statement of defence, it was my finding that although the plaintiffs had fulfilled the threshold for this court to consider its application, the plaintiffs' application must be dismissed as I found that the defendant had successfully raised an inherently probable disputes and denials. I am satisfied that there are issues that ought to be tried at a full trial. These are issues that are not suitable to be determined at this stage through affidavit evidence, and it would not be appropriate for a summary judgment pursuant to

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O 14 to be granted.

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[11] The plaintiffs' application was thus dismissed.

Application dismissed

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Reported by Izzat Fauzan

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